STATE OF MICHIGAN

COURT OF APPEALS

DIVERSIFIED MEAL SERVICES, INC.,

Plaintiff/Counter-Defendant-Appellant,

v

DEBORAH CROWNOVER, d/b/a RE/MAX MID-MICHIGAN,

Defendant-Appellee,

and

FILLMORE'S, INC.,

Defendant-Counter-Plaintiff.

UNPUBLISHED
June 2, 2009

No. 284633
Jackson Circuit Court
LC No. 07-001666-CZ

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent from the majority's decision to affirm, as I conclude that the trial court erred in its conclusion that plaintiff's claim was frivolous.

This Court reviews a trial court's finding that an action was devoid of arguable legal merit and, therefore, frivolous under MCL 600.2591(3)(iii), for clear error. *Meagher v Wayne States University*, 222 Mich App 700, 727; 565 NW2d 401 (1997). "The circumstances existing at the time a case is commenced is of critical importance in determining if a lawsuit has a basis in fact or law." *Id.*

Although plaintiff's complaint may not have been artfully drafted, it is clear that plaintiff was attempting to bring Re/Max under the jurisdiction of the trial court such that Re/Max would be required to obey whatever disposition of the money the trial court ordered. This was permissible under MCR 2.206(A)(2)(b), which provides that "[a]ll persons may be joined in one action as defendants . . . if their presence in the action will promote the convenient administration of justice." Indeed, six months after litigation was instituted, a stipulation was entered into among the three parties providing for Re/Max to relinquish the $6,000 and place it

into an escrow account for the court. Accordingly, plaintiff's inclusion of Re/Max as a defendant had the desired result—it brought the $6,000 within the purview of the trial court.

The trial court apparently relied on the fact that "ReMax never suggested that they would not release the money to [plaintiff] if Fillmore's provided written consent." This is irrelevant. At the time plaintiff filed suit, Re/Max had refused to refund the money, concluding that litigation was imminent. Further, given that Re/Max was the agent for Fillmore's, plaintiff could reasonably believe that Re/Max might be hesitant to refund the money based on Re/Max's business relationship with Fillmore's. Plaintiff erred on the side of caution and included Re/Max based on its status as the holder of the escrow funds. This was permissible under the court rules. Accordingly, I conclude that the trial court clearly erred in concluding that plaintiff's claim was frivolous. And, because plaintiff's claim was not frivolous, Re/Max was not entitled to costs pursuant to MCL 600.2591. Accordingly, I would reverse and remand.

/s/ Douglas B. Shapiro